BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA D. MONTGOMERY	)	
Claimant	)	
VS.	)	
	)	Docket No. 259,193
DANA ENGINE CONTROLS	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the March 8, 2004 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument in Wichita, Kansas, on July 20, 2004.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Garry W. Lassman of Pittsburg, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record also includes the parties' written stipulation admitting the task analysis reports of Karen Crist Terrill and Jim Molski and the parties' written stipulation regarding claimant's average weekly wage that were filed with the Division of Workers Compensation on June 6, 2003, and December 12, 2003, respectively.

ISSUES

The parties stipulated claimant's December 6, 1999 left ankle injury arose out of and in the course of her employment with respondent. In the March 8, 2004 Award, Judge Frobish granted claimant benefits for an 11 percent whole person functional impairment after finding claimant had also sustained permanent impairment to her low back, which resulted from an altered gait. Moreover, the Judge concluded claimant had abandoned her

job with respondent and, therefore, the Judge denied claimant's request for a work disability (a permanent partial general disability greater than the whole person functional impairment rating).

Claimant contends Judge Frobish erred. Claimant argues she did not abandon her job with respondent. Instead, claimant contends respondent advised that the company no longer had a job for her. Consequently, claimant asks the Board to find she sustained a 28.25 percent wage loss, a 65.5 percent task loss, and a 46.88 percent work disability.

Conversely, respondent contends the Board should limit claimant's permanent disability benefits to those for a scheduled injury to the left leg as provided by K.S.A. 1999 Supp. 44-510d. In the alternative, respondent argues claimant's permanent disability benefits should be limited to an 11 percent whole person functional impairment under K.S.A. 1999 Supp. 44-510e as the company allegedly had available accommodated work at a comparable wage had claimant not abandoned her job.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On December 6, 1999, while working on respondent's assembly line, claimant's left ankle popped. The next morning claimant could hardly walk. Claimant promptly reported the injury and was referred for medical treatment.

While undergoing medical treatment, claimant was placed on crutches, in a walking brace, and in a walking boot. Claimant then developed pain and soreness in her hips and low back, which she attributes to walking abnormally.

In May 2000, claimant underwent left ankle surgery. But, according to claimant, the surgery helped little, if any, and she continues to experience problems with standing, walking, climbing stairs, and lifting due to pain and her ankle giving way. Moreover, prolonged standing, prolonged sitting, lifting and bending aggravate her low back.

Following the accident and following surgery, claimant continued working for respondent. Claimant testified her employment with respondent ended when she reported to the company that her pain was getting to her and the company responded by telling

claimant the company no longer had a job for her.[1] According to claimant, at that time she was working in molding, standing and operating a machine every day. Claimant testified, in part:

> I just told them I was hurting and could not do that job and they told me they didn't have a job for me.[2]

The record indicates claimant last worked for respondent on February 5, 2001.[3]

After leaving respondent's employ, claimant looked for other work[4] and found a telemarketing job, where she worked for approximately one month earning $5.15 per hour. And in late November 2001,[5] claimant and her husband began working for a Nebraska dairy farm where claimant works four or five hours per day, five days per week, helping the dairy owner with the morning milking. The parties stipulated claimant receives an average weekly wage in that employment of $260.

1. What is claimant's functional impairment?

The record contains the medical opinions from three physicians rating claimant's functional impairment using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant presented the medical opinion of Dr. Pedro A. Murati, who evaluated claimant at her attorney's request. Dr. Murati, who is board-certified in rehabilitation and physical medicine, electrodiagnosis and independent medical examinations, examined claimant in April 2002 and rated claimant as having a five percent whole person functional impairment due to low back sprain and left SI joint dysfunction and having a six percent whole person functional impairment for the left lower extremity, which combine for an 11 percent whole person functional impairment. Moreover, the doctor also testified that it was inappropriate to rate claimant at that time as her left ankle was expected to progress to the point where she would require a fusion. Dr. Murati attributes claimant's back injury to the limping, which was caused by the left ankle injury.

---

[1] R.H. Trans. at 18.

[2] *Id.* at 19.

[3] Rash Depo. at 6.

[4] R.H. Trans. at 29.

[5] See R.H. Trans. at 28 where claimant testified she began that job on the Monday following Thanksgiving 2001.

Respondent presented the testimony of Dr. John W. Fanning, the orthopedic surgeon who operated on claimant's left ankle. The doctor, who limits his practice to treating feet and ankles, rated claimant's left ankle injury as comprising a 16 percent functional impairment to the foot and ankle. The doctor had no recollection whether claimant complained about any other body part during his period of treatment, which ran from April 2000 through March 22, 2001. Moreover, the doctor was not asked to examine or evaluate claimant's back for a functional impairment opinion.

The third and final functional impairment rating was provided by board-certified orthopedic surgeon Dr. C. Reiff Brown, who evaluated claimant in September 2002 at Judge Frobish's request. Dr. Brown concluded claimant had a 15 percent functional impairment to the left lower extremity and a five percent whole person functional impairment due to her low back, which combine for an 11 percent whole person functional impairment. The doctor believes claimant's altered gait aggravated her back, causing her present back pain.

The Judge found claimant sustained an 11 percent whole person functional impairment. And the Board agrees.

2. What is claimant's permanent partial general disability?

Claimant contends respondent advised her it no longer had a job for her.[6] Claimant contends she would have returned to work for respondent if it had offered her work as she lost her house and truck and needed the income.

On the other hand, Ed Rash, respondent's safety supervisor, testified he spoke with claimant on several occasions in February and March 2001. Moreover, according to Mr. Rash, on March 19, 2001, he spoke with claimant and told her the company had received paperwork from Dr. Fanning which indicated claimant could return to sedentary work as of February 23, 2001. Mr. Rash also testified he advised claimant during their March 19 conversation that such work was available.[7] Mr. Rash's notes further indicate he attempted to contact claimant on at least two occasions after March 19, 2001, but he was unsuccessful. When claimant did not report to work, respondent eventually sent her a letter dated May 3, 2001, advising claimant the company had terminated her employment as of that date.

[6] Montgomery Depo. at 6.

[7] Rash Depo. at 10.

Carolyn Leiker, respondent's plant nurse during the period in issue, reviewed the entries she had made in claimant's medical records. According to Ms. Leiker's notes, on January 30, 2001, claimant complained that her ankles were hurting and the doctor did not know what else to do. Those plant records also indicate that claimant saw Dr. Fanning on February 22, 2001, for her ankle complaints but Ms. Leiker had to call the doctor's office several times before eventually receiving claimant's restrictions on April 9, 2001, and learning that claimant was restricted from prolonged standing or walking and working overtime. Finally, Ms. Leiker testified respondent had work available to claimant that would have accommodated her medical restrictions.

Following the depositions of Mr. Rash and Ms. Leiker, claimant testified a second time in this claim. Claimant only recalls having one conversation with Mr. Rash. And claimant does not recall any conversation in which she was told respondent would provide her sedentary work. Moreover, claimant does not recall who told her that respondent no longer had a job for her, but it was a female.[8]

The Board concludes claimant has failed to prove that she made a good faith effort to retain her employment with respondent. Claimant's testimony is somewhat nebulous regarding the conversation in which she was allegedly advised that respondent no longer had a job for her. Claimant is unable to identify the person whom she spoke with about no longer having a job. And the record fails to establish when that alleged telephone conversation occurred. In contrast, Mr. Rash's testimony and his personal notes indicate he advised claimant in March 2001 that she had been released to restricted work and that respondent had sedentary work for her. Mr. Rash's notes also indicate he attempted to call claimant on at least two occasions following their March 19, 2001 conversation but he was unsuccessful.

Because claimant has sustained an injury that is not set forth in the scheduled injury statute, K.S.A. 1999 Supp. 44-510d, her entitlement to permanent disability benefits is governed by K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning

[8] Montgomery Depo. at 6.

> after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that the post-injury wage should be based upon the worker's retained ability to earn wages rather than actual post-injury wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

After returning to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the permanent partial general disability formula. Based upon the above finding that claimant failed to prove she made a good faith effort to retain her employment with respondent, the Board must impute a post-injury wage for purposes of the permanent partial general disability formula. And as the record establishes that respondent was willing to accommodate claimant's injuries, the Board will impute the wages she was earning while working for respondent. As there is no evidence that claimant was earning less than 90 percent of her pre-injury wage while working for respondent following the December 1999 accident, the

---

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] *Id.* at 320.

Board concludes that claimant's permanent partial general disability should be limited to her 11 percent whole person functional impairment.

The Board adopts the findings and conclusions set forth in the Award that are consistent with the above.

AWARD

WHEREFORE, the Board affirms the March 8, 2004 Award.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director